

# **NEIGHBORS FIGHTING STRS: A PROPOSAL**

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## I.

### **Introduction**

Both the curse and beauty of practicing local government law in Texas is that local governments often find themselves on the cutting edge of innovation, whether for good or for bad. This is particularly true in addressing land use matters. Ten or fifteen years ago, most cities did not anticipate that single-family homeowners would offer for rent to strangers a room or a portion of their homes for weekends, or that those same homeowners would ever consider renting their backyard pools or their gourmet kitchens and dining rooms to strangers on an hourly basis.

The history of municipal regulation of short-term rentals is well known. The current case law and a brief review of recent proposed legislation is addressed in this paper; however, this review goes further. I assume, rightly or wrongly, that both the state courts and the Texas Legislature will not be sympathetic to a high degree of municipal regulation, and in fact may only leave municipalities the option of enforcing traditional nuisance ordinances (loud noise, trash on public property, public intoxication, etc.) when property is offered for short-term rental. With that premise, the purpose of this paper is to consider an alternative that may be available to private property owners to address STRs in the event municipalities are stripped of most of their regulatory authority. While this proposal is not ideal, in areas where STRs are not welcome, this may provide private property owners with some recourse—assuming their neighbors agree with them!

## II.

### **Short-Term Rentals in Texas and Evolving Municipal Regulations**

In late 2022 and early 2023 there was a flurry of activity in North Texas about municipal regulation of short-term rentals (“STRs”). STR regulation continues to be a hot topic in land use practice, and not just in North Texas. Even though there have been multiple Texas cases involving STRs, the court opinions generally do not comprehensively define the contours of municipal regulation. The result: cities in Texas are still struggling to determine the permissible extent of STR regulation. Dallas, Fort Worth and Plano are emblematic of this struggle.

#### **A. Texas Case Law on Municipal Regulation of STRs**

The Texas Supreme Court has not yet weighed in on the topic of municipal regulation of STRs,<sup>1</sup> and even though several STR cases have been considered by Texas

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<sup>1</sup> In *Tarr v. Timberwood Park Owners Association*, 556 S.W.3d 274 (Tex. 2018), the Texas Supreme Court did, however, address short term rentals in the context of restrictive covenants being enforced by a homeowners’ association against a resident who utilized his property in the subdivision as an STR. The Court, after a very detailed discussion on

appellate courts, they have provided little substantive direction for municipalities—but perhaps municipalities nevertheless can glean some guidance from the few appellate opinions addressing STRs.

The City of Austin has been at the forefront of STR regulations during the last decade. The February 2016 amendments to the Austin STR ordinance established three different categories of short-term rentals and corresponding licenses: Type 1 (owner-occupied residential rentals); Type 2 (residential rentals not part of a multifamily residential use, the unit is not owner-occupied and not associated with an owner-occupied principal residential use); and Type 3 (rentals that are part of a multifamily complex).<sup>2</sup> While the Austin ordinance provides for a fairly detailed licensing and regulatory scheme (required licenses, local contacts, occupancy limits, general limitations on uses and prohibited activities on short-term rental properties), the 2016 amendment was adopted in response to an outcry by neighbors living near short-term rental properties. Perhaps the most controversial provision of that ordinance amendment related to Type 2 rentals, phasing out all such rentals by April 1, 2022.<sup>3</sup> Not surprisingly, litigation ensued.

In *Zaatari v. City of Austin*,<sup>4</sup> the court of appeals addressed the April 1, 2022, termination date for all Type 2 rentals.<sup>5</sup> It should be noted, however, the Austin ordinance also imposed several conditions on properties operated as STRs: (1) banning all assemblies, including “a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping,” whether inside or outside, after 10:00 p.m. and before 7:00 a.m.; (2) banning outdoor assemblies of more than six adults at any time; (3) prohibiting more than six unrelated adults or ten related adults from using the property at any time; and (4) giving City officials authority to “enter, examine, and survey” the short-term rentals to ensure compliance with applicable provisions of the

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the law pertaining to restrictive covenants in Texas, held that the restrictive covenants in question did not prohibit the resident’s use of his home as a short-term rental. In a February 2022 opinion, the Texas Supreme Court wrote, however, that a homeowners’ association’s deed restrictions could be amended to prohibit short-term rentals of property. *See Jbrice Holdings v. Wilcrest Walk Townhomes Ass’n*, 644 S.W.3d 179, 188 (Tex. 2022). *See also* the Texas Supreme Court’s discussion of short-term rentals when it denied a petition for review in the *Muns* lawsuit, *infra*, n. 52.

<sup>2</sup> See Austin, Tex., Code of Ordinances §§ 25-2-788-790.

<sup>3</sup> See Austin, Tex., Code of Ordinances § 25-2-950.

<sup>4</sup> 615 S.W.3d 172 (Tex. App.—Austin 2019, pet. denied).

<sup>5</sup> *Zaatari*, 615 S.W.3d at 181.

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## Title search: Neighbors Fighting Short Term Rentals: A Proposal

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28<sup>th</sup> Annual Land Use Conference session

"A Private Solution to a Public Concern? Private Restrictive Covenants versus Short Term Rentals, Residential Amenities, and Accessory Dwelling Units"